SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
OCT 10 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 713

WILLIAM JOSEPH BREAULT AND BONNIE JO ELLEN KATHRYN BREAULT,

Petitioners,

vs.

HAROLD L. FEIGENHOLTZ, EXECUTOR OF THE WILL OF OSCAR J. BREAULT, DECEASED; ESTELLE ANGELA BREAULT, KENNETH BREAULT, WESLEY MEMORIAL HOSPITAL, A CORPORATION, AND HAROLD L. FEIGENHOLTZ, INDIVIDUALLY AND AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OSCAR J. BREAULT, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN J. YOWELL,
G. KENT YOWELL,
38 S. Dearborn Street,
Chicago, Illinois 60603,
Counsel for Petitioners.

PHILIP B. KURLAND,
1111 E. 60th Street,
Chicago, Illinois 60637,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.....

WILLIAM JOSEPH BREAULT AND BONNIE JO ELLEN KATHRYN BREAULT,

Petitioners,

vs.

HAROLD L. FEIGENHOLTZ, EXECUTOR OF THE WILL OF OSCAR J. BREAULT, DECEASED; ESTELLE ANGELA BREAULT, KENNETH BREAULT, WESLEY MEMORIAL HOSPITAL, A CORPORATION, AND HAROLD L. FEIGENHOLTZ, INDIVIDUALLY AND AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OSCAR J. BREAULT, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on June 13, 1967.

I.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court is unreported. It is printed in the appendix prepared for the use of the court below and filed herewith pursuant to para-

graph 3 of Rule 21. (App. 221-229.) The opinion of the court below is printed in Appendix A hereto *infra* and is reported in 380 F. 2d 90.

II.

JURISDICTION.

The judgment of the court below was entered on June 13, 1967. (App. B *infra*, p. 16.) Petitions for rehearing and rehearing *en banc* timely filed on June 27, 1967 were denied on July 13, 1967. (App. C and D *infra*, pp. 17-18.) The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

III.

QUESTIONS PRESENTED.

1. Does the existence of the requisite jurisdictional amount depend on the capacity of the defendant to pay, or an estate to distribute, to plaintiffs, amounts in excess of the jurisdictional amount?

2. If a defendant or an estate's incapacity to pay to plaintiffs amounts in excess of the jurisdictional amount is a bar to jurisdiction, should the trial court include among the defendant's or the estate's assets to be measured for this purpose unliquidated claims belonging to the defendant or to the estate in amounts that give the defendant or the estate such capacity?

3. If the defendant's or estate's incapacity to pay to plaintiffs amounts in excess of the jurisdictional amount is a bar to jurisdiction, as of what time are the defendant's or estate's assets to be measured for that purpose?

4. If a defendant's or estate's incapacity to pay to plaintiffs amounts in excess of the jurisdictional amount is a bar to jurisdiction, is plaintiff not entitled to a hearing on the questions of fact and issues of law that must be re-

solved to determine the defendant's or estate's capacity to pay amounts in excess of jurisdictional amount?

IV.

THE STATUTE INVOLVED.

The statutory provision involved is 28 U. S. C. § 1332, which provides in pertinent part as follows:

> "(a) District courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs and is between—
>
> (1) Citizens of different states; * * *"

V.

STATEMENT OF THE CASE.

This is a diversity action brought by two infant children of Oscar Breault contesting the validity of Oscar's will because of the undue influence exercised by one Harold L. Feigenholtz in the framing of that will. (App. 5-12.) The contestants are citizens of Kentucky. The proponents, including Harold L. Feigenholtz, executor under the will, are all citizens of Illinois.

When the action was commenced, the estate was inventoried by Feigenholtz at a value in excess of $500,000. (App. 66-67.) Only one claim was filed against the estate in the sum of $118.00. (App. 159.) It was the contention of the contestants that, if the will were declared invalid, they would be entitled to their statutory shares of the estate, each share amounting to a sum far in excess of $10,000.

After the commencement of this action, Feigenholtz filed an amended inventory which distinguished between Oscar's personal assets, valued by Feigenholtz at $25,805, and the

property over which Oscar exercised his power of appointment by the will in question. The latter was valued by Feigenholtz at $477,568.80. (App. 110-112.) The power of appointment had been given to Oscar by his mother, Kathryn Breault, in her will. Feigenholtz and Dahm were trustees under Kathryn's will. As such trustees they then filed claims against Oscar's estate in the sum of $37,363.47, to which Feigenholtz, as executor of Oscar's will, consented. The claims were allowed in an *ex parte* hearing in the Probate Court. (App. 102-108.)

Feigenholtz then filed a motion to dismiss this action on the ground that the amount in controversy did not exceed $10,000, because Oscar's personal estate was insolvent and the property appointed under the will was no proper part of the estate because that property would pass under Kathryn's will if Oscar's will were not admitted to probate. (App. 23-27.) In a separate proceeding, the Supreme Court of Illinois held that the property that was the subject of the power of appointment need not be inventoried in Oscar's estate. *In re Estate of Breault*, 29 Ill. 2d 165, 174-178 (1963). The Supreme Court of Illinois held, at the same time, that Feigenholtz and Dahm, as trustees under Kathryn's will, were obliged to render an accounting to the estate of Oscar Breault. *Id.* at 178-179.

Thereafter the Probate Court allowed interim fees to the attorney for the executor under Oscar's will, to be paid out of the properties that were the subject of the power of appointment. The Illinois Appellate Court held that although the appointive assets were not part of Oscar's estate for purposes of inventory, they were equitable assets of the estate. *In re Estate of Breault*, 63 Ill. App. 2d 246, 264-266 (1965). The court held at the same time that if Oscar's will should be defective as an exercise of the power of appointment, Oscar's creditors would be preferred in equity to the takers in default of appointment,

pursuant to a rule of equity in Illinois that "* * * where there has been a defective execution, the court will supply the defective execution in favor of a purchaser, creditor, wife or child . . ." *In re Estate of Breault,* 63 Ill. App. 2d 246, 265-266, quoting from *Gilman* v. *Bell,* 99 Ill. 144.

There is still pending an action in the Probate Division of the Circuit Court of Cook County to determine the amount of the Oscar Breault estate's claim against Feigenholtz and Dahm for an accounting under Kathryn's testamentary trust. The claim was alleged in these proceedings to be in excess of $1,000,000. (App. 205, 225-226.) The District Court denied leave to file an amended and supplemental complaint in this action to show the detailed basis for the estate's claim against Feigenholtz and Dahm pending in the probate proceedings. (App. 197-217.) The trial court dismissed the complaint for want of jurisdictional amount. (App. 226.) It was this judgment that was affirmed by the Court of Appeals for the Seventh Circuit on June 13, 1967. (App. A & B, *infra,* pp. 9-16.) On July 13, 1967, petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals. (App. C & D, *infra,* pp. 17, 18.)

VI.

REASONS FOR GRANTING THE WRIT.

1. The judgment and opinion of the Court below creates a novel doctrine of widespread importance in the administration of the federal judicial system, to wit, that in determining the existence of jurisdictional amount, the trial court shall determine whether the defendant or an estate is capable of paying to plaintiff an amount in excess of the statutory minimum. This position would require an additional inquiry oft-times of great complexity before the trial court could proceed to hear a case whether arising under diversity jurisdiction or general federal question jurisdiction.

2. The judgment and opinion of the Court below contradicts two primary rules that this Court has laid down for the determination of the existence of jurisdictional amount.

A. "It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289 (1938). See *Sears Roebuck & Co.* v. *American Mutual Liability Company*, 372 F. 2d 435 (7th Cir. 1967). For the plethora of other cases following this rule see 2A Moore's Federal Practice 833 n. 5 (2nd ed.). Certainly in the instant case there is no legal certainty that contestants cannot recover more than the jurisdictional amount. If, as the Illinois courts have ruled, the appointive assets are considered equitable assets of the estate, *In re Estate of Breault*, 63 Ill. App. 2d 246, 264-266 (1963); *Gilman* v. *Bell*, 99 Ill. 144, 149-151 (1881) and see A. L. I., Restatement of Property § 347(b); A. L. I. Restatement of Restitution, § 184(j), certainly the value of recovery, if they are successful, would far exceed the jurisdictional amount. So too, whether or not the appointive assets are part of the estate, if the unliquidated claim of the estate against the trustees under Kathryn's will is allowed, it cannot be said with legal certainty that the value of contestants' rights would not far exceed the jurisdictional amount.

B. "Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289-290 (1938). Again the supporting cases are legion. See *e.g. Gulf Refining Company* v. *Price*, 232 F. 2d 25, 30, cert. den. 352 U. S. 981 (5th Cir. 1961) and the cases cited in 2A Moore's Federal Practice 831, n. 1.

Feigenholtz filed an amended inventory because of the

filing of this action. (App. 59-60.) He improperly attempted to release the estate's claim for an accounting. *In re Estate of Breault*, 29 Ill. 2d 165, 179 (1963). With the disapproval of the so-called "Fourth Report and Account" by the Supreme Court of Illinois (*In re Estate of Breault*, 29 Ill. 2d 165, 179) there is, as shown by the document alone, $61,321.06 to be accounted for by Feigenholtz and Dahm to Oscar's estate. (App. 92.)

Certainly defendants should not be permitted to rely on their own misconduct to destroy the jurisdiction of the District Court.

3. The opinion below conflicts with the reasoning of this Court in *Overby* v. *Gordon*, 177 U. S. 214, wherein this Court held that the amount of the estate which passes by a will, if held valid, constitutes the matter in dispute on a contest of the will, without regard to the amount of the interest of any one of the contestants, within the meaning of the Act of Congress of February 9, 1893 (27 Statutes at Large 436) requiring the matter in dispute on appeal from a judgment of the Court of Appeals of the District of Columbia to exceed the sum of $5,000. cf. *Morgan* v. *Adams*, 211 U. S. 627.

CONCLUSION.

For the reasons herein stated petitioners pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 13, 1967.

Respectfully submitted,

JOHN J. YOWELL,
G. KENT YOWELL,
38 S. Dearborn Street,
Chicago, Illinois 60603,
Counsel for Petitioners.

PHILIP B. KURLAND,
1111 E. 60th Street,
Chicago, Illinois 60637,
Of Counsel.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

SEPTEMBER TERM, 1966 — APRIL SESSION, 1967.

No. 16048

WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT,

Plaintiffs-Appellants,

v.

HAROLD L. FEIGENHOLTZ, Executor, of the Will of Oscar J. Breault, deceased; ESTELLE ANGELA BREAULT, KENNETH BREAULT, WESLEY MEMORIAL HOSPITAL, a corporation, and HAROLD L. FEIGENHOLTZ, indiviually and as Trustee under the Last Will and Testament of Oscar J. Breault, deceased,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 13, 1967.

Before SCHNACKENBERG, CASTLE and FAIRCHILD, *Circuit Judges.*

CASTLE, *Circuit Judge.* Plaintiffs-appellants, William Joseph Breault and Bonnie Jo Ellen Kathryn Breault,

two of the heirs of Oscar J. Breault, deceased, brought this proceeding in the District Court to set aside the Will of Oscar J. Breault as the product of undue influence. Plaintiffs' complaint, filed July 1, 1960, alleged diversity of citizenship and that "the amount involved herein exceeds the sum of $10,000.00 exclusive of interest and costs". The complaint also alleged that if the instrument purported to be the last will and testament of Oscar J. Breault "is found and held to be invalid as herein prayed, plaintiffs, as heirs, will be entitled to money and property exceeding in value the amount devised and bequeathed to them under said instrument by more than $10,000.00 exclusive of interest and costs". The defendant, Harold L. Feigenholtz, individually, and as executor and trustee under the Will of Oscar J. Breault, filed a motion to dismiss the complaint[1] on the ground that the court lacked jurisdiction because the matter in controversy is less than the requisite jurisdictional sum or value. The motion was supported by affidavit that Oscar's estate was insolvent. At a hearing before the court on March 30, 1961, various exhibits were introduced in evidence and testimony adduced on the issue of solvency of Oscar's estate as bearing on the existence of the requisite jurisdictional value. On November 13, 1961, the court entered an order remitting the plaintiffs to the State courts for such proceedings as would result in a final determination of whether at the date of the filing of the complaint the estate of Oscar was entitled to an accounting from the executors or trustees of the estate of Kathryn M. Breault, Oscar's mother, as claimed by plaintiffs, and if so, the amount thereof, and whether Oscar's estate was solvent or insolvent. Hearing on the motion to dismiss for want of jurisdiction was suspended pending such proceedings. No review of this order was sought.

---

1. The motion was later joined in by the remaining defendants-appellees.

The provisions of Oscar's will, and the provisions of the will of his mother, Kathryn M. Breault, insofar as they are pertinent to the instant litigation, are set forth in *Breault* v. *Feigenholtz,* 7 Cir., 358 F. 2d 39, 41-42, cert. den. 385 U. S. 824, and need not be repeated here.

The record discloses that following the November 13, 1961, order the plaintiffs participated in state court actions culminating in final determinations that the provisions of Oscar's will exercising his testamentary power of appointment over the property in his mother's testamentary trust did not constitute such trust property a part of Oscar's estate (*In re Estate of Oscar J. Breault,* 29 Ill. 2d 165) and that Oscar's estate was insolvent (*In re Estate of Breault,* 63 Ill. App. 2d 246, 263).

On October 6, 1966, the plaintiffs moved for leave to file a tendered amended and supplemental complaint represented as setting forth "with particularity" an additional allegation, made on information and belief, that the estate of Oscar has an uninventoried claim against Harold L. Feigenholtz and Richard Dahm[2] in excess of $1,000,000.00. The defendants filed objections to the motion for leave to file on the ground, *inter alia,* that the averments of the tendered complaint are inadequate to confer jurisdiction. The court treated the objections as a motion to dismiss on the basis of which the court denied leave to file the tendered amended and supplemental complaint and entered an order dismissing plaintiffs' action for want of federal jurisdictional

2. The tendered amended and supplemental complaint named Richard Dahm, also an executor and trustee under the will of Kathryn M. Breault, as an additional party defendant. An earlier, June 27, 1966, motion to file an amended complaint alleging the existence of such uninventoried claim against Feigenholtz and Dahm was denied "without prejudice" on the ground that the amended complaint then tendered failed to meet the requirement of Rule 9(b) of the Federal Rules of Civil Procedure that allegations of fraud be stated with particularity. Other objections thereto were not passed on.

amount. The plaintiffs' motion to vacate the order of dismissal was denied, and plaintiffs appealed.

In the posture in which this case reaches us it is clear that the assets of Kathryn M. Breault's testamentary trust are not a part of Oscar's estate. *In re Estate of Oscar J. Breault,* 29 Ill. 2d 165. And it is equally clear from the record herein, as well as from the determination made in *In re Estate of Breault,* 63 Ill. App. 2d 246, that from the standpoint of inventoried assets and of the claims subsequently filed in and allowed by the Illinois probate court Oscar's estate has at all times been insolvent. Thus, unless, as plaintiffs contend, the allegations of the tendered amended and supplemental complaint are of themselves adequate, in the face of the challenge to jurisdiction made by defendants, to establish the existence of the requisite jurisdictional "value"[3] it was not error for the District Court to deny the motion for leave to file and to dismiss the action.

The federal diversity action the plaintiffs seek to maintain is a proceeding to set aside a will. The action seeks only an adjudication as to whether or not the instrument produced is the will of the testator. *Strachan* v. *Nisbet,* 7 Cir., 202 F. 2d 216, 219; Ill. Rev. Stat. 1965, ch. 3, § 92. It is not an action for a money judgment or decree, in which instance the "sum" claimed controls the existence of the requisite jurisdictional amount if the claim is apparently made in good faith, and under the rule of *St. Paul Mercury Indemnity Co.* v. *Red Cab Company,* 303 U. S. 283, 288-289, "[i]t must appear to a legal certainty that the claim is

3. Although plaintiffs, on brief, also contend it was error for the district judge to dismiss the action for want of jurisdictional amount "without a hearing when on the record before him he was not and could not have been convinced to a legal certainty that the requisite amount was not present", they point to nothing in the record which shows they urged the necessity of a further evidentiary hearing before the District Court or in their motion to vacate the order of dismissal.

really for less than the jurisdictional amount to justify dismissal". Here, as in *Hague* v. *C. I. O.*, 307 U. S. 496, 507, the relief sought is of a nature that a motion to dismiss based upon the absence of jurisdictional amount calls for substantial proof on the part of the plaintiffs of facts justifying the conclusion that the action involves "value" in the necessary amount. In view of the challenge made, mere averment of the amount claimed to be in controversy is not enough to confer jurisdiction. And the existence of such "value" is to be measured by that which the plaintiffs seek to gain by their action—the pecuniary consequence to them. *Cf. Overby* v. *Gordon*, 177 U. S. 214; *Morgan* v. *Adams*, 211 U. S. 627. *Thomson* v. *Gaskill*, 315 U. S. 442, 447.

We recognize that it places a heavy burden upon the plaintiffs to require that they make substantial proof of facts which would justify the conclusion that Oscar's estate possesses an uninventoried claim based on derelictions of the executors and trustees of Kathryn's will and testamentary trust which would result in Oscar's estate recovering thereon a sufficient amount to discharge all of the obligations against it and to distribute to plaintiffs amounts meeting the jurisdictional requirement. But, it was the intent of Congress drastically to restrict federal jurisdiction in diversity cases (*St. Paul Mercury Indemnity Co.* v. *Red Cab Company*, 303 U. S. 283, 288) and that plaintiffs may find it difficult to adduce satisfactory proof does not require that bare allegations, based on information and belief be accepted as establishing the existence of jurisdictional amount.

Plaintiffs' reliance upon our recent decision in *Sears, Roebuck and Co.* v. *American Mutual Liability Insurance Company*, 7 Cir., 372 F. 2d 435 (No. 15792, Opinion filed February 10, 1967) is misplaced. In that case Sears was the defendant in a pending product liability suit brought

in an Illinois state court by a customer seeking recovery of $500,000 damages for personal injuries. Sears brought a diversity declaratory judgment action in federal district court against American Mutual alleging that it was the product liability insurer of Flagg-Utica Corporation from whom Sears had purchased the product involved, and that the coverage afforded under the policy issued by American Mutual extended to Sears as a vendor of the product supplied by Flagg-Utica. Sears sought a declaratory adjudication that the insurer was obligated to defend Sears and to pay any judgment rendered against Sears. The district court dismissed Sears' complaint. This Court reversed. One of the grounds upon which the district court dismissed was that Sears might not be found liable in the state court litigation, in which case the costs of defense of the suit would likely be less than $10,000. The district court reasoned that this would cause a failure of jurisdictional amount and render any prior federal declaration moot. This Court in reversing relied upon the rule set forth in *St. Paul Mercury Indemnity Co., supra,* and held that Sears' claim met the requisite jurisdictional amount. It is obvious that the pending $500,000 suit against it afforded Sears with a "good faith" basis for its allegation of the existence of requisite jurisdictional amount.

Our decision in *Sears, supra,* with respect to the existence of requisite jurisdictional amount is of no aid to the plaintiffs. The instant appeal does not involve an action in which a federal court adjudication of monetary liability to plaintiffs is sought, and the rule of *St. Paul Mercury Indemnity Co.* therefore applicable, as was the case in *Sears.*

In their brief plaintiffs allude to the fact that the District Court entered an order in this action, like that entered in their declaratory judgment action reviewed in

Breault v. *Feigenholtz*, 7 Cir., 358 F. 2d 39, denying their petition for approval of the settlement agreement which was involved in the case last cited. They request that we reconsider our ruling in that appeal affirming the District Court's refusal to approve the proposed settlement agreement (358 F. 2d 39, 44) and attempt to present additional argument on the merit of our previous decision. Our decision affirming the District Court's action in rejecting the settlement agreement is conclusive on that matter and we decline to reconsider it. The ruling in the previous case estops plaintiffs from relitigating that issue.

The judgment orders appealed from are affirmed.

AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.
Chicago, Illinois 60604.

Tuesday, June 13, 1967.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Thomas E. Fairchild, Circuit Judge.

WILLIAM JOSEPH BREAULT, *et al.*,
Plaintiffs-Appellants,

No. 16048 *vs.*

HAROLD L. FEIGENHOLTZ, Executor of the Will of Oscar J. Breault, deceased, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment orders of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C.

UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.
Chicago, Illinois 60604.

Thursday, July 13, 1967.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Thomas E. Fairchild, Circuit Judge.

WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT, *Plaintiffs-Appellants,*

No. 16048 *vs.*

HAROLD L. FEIGENHOLTZ, Executor etc., *et al.*, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED that the petition for a rehearing of this cause filed by the appellants herein be, and the same is hereby DENIED.

APPENDIX D.

UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.
Chicago, Illinois 60604.

Thursday, July 13, 1967.

Before:

Hon. John S. Hastings, Chief Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Win G. Knoch, Circuit Judge,
Hon. Latham Castle, Circuit Judge.
Hon. Roger J. Kiley, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge,
Hon. Thomas E. Fairchild, Circuit Judge,
Hon. Walter J. Cummings, Jr., Circuit Judge.

WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT, *Plaintiffs-Appellants,*

No. 16048 *vs.*

HAROLD L. FEIGENHOLTZ, Executor etc., *et al.*, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court *en banc* that the petition for a rehearing *en banc* of this cause, filed by the appellants herein, be, and the same is hereby DENIED.